

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JONATHAN EARL JEFFERSON,

Defendant-Appellant.

UNPUBLISHED
December 5, 2013

No. 309755
St. Clair Circuit Court
LC No. 11-002935-FH

Before: K. F. KELLY, P.J., and SHAPIRO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals by right from his convictions by a jury of felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was acquitted of altering identification marks on a firearm, MCL 750.230. The trial court sentenced defendant as an habitual offender, third offense, MCL 769.11, to 30 to 120 months' imprisonment for felon in possession and two years' imprisonment for felony firearm, the terms to run consecutively. Defendant appeals his convictions, arguing that the evidence was insufficient to convict him and that the trial court erroneously admitted evidence of a sixteen-year-old prior conviction to impeach his testimony. We affirm.

This case arises out of defendant handing a gun to a witness at the witness's apartment. The witness apparently wanted nothing whatsoever to do with the gun and promptly called the police, who retrieved it. The witness described defendant as an "acquaintance" and provided as much identification as she could. Defendant eventually demanded the gun's return; the witness and her fiancé told defendant that they had disposed of it in the river. Defendant and other witnesses testified that defendant was elsewhere at the time he allegedly delivered the gun. Defendant and the prosecution both made references to a stipulation that defendant was ineligible to possess a firearm due to a felony record, but the trial court nevertheless permitted the prosecutor, over defendant's objection, to impeach defendant at trial with limited questions about the nature of his prior conviction for armed robbery.

Defendant first contends that the evidence was insufficient to convict him because no evidence was introduced proving his status as a felon ineligible to possess a firearm. Claims of insufficient evidence are reviewed de novo, and we assess all evidence in the light most favorable to the prosecution to determine whether the trier of fact could rationally have found all elements of a charged offense proven beyond a reasonable doubt. *People v Ericksen*, 288 Mich

App 192, 195-196; 793 NW2d 120 (2010). The elements of being a felon in possession are that (1) the defendant possessed a firearm, (2) the defendant was a convicted felon, and (3) the defendant's right to possess a firearm had not yet been restored. MCL 750.224f; *People v Perkins*, 262 Mich App 267, 270-271; 686 NW2d 237 (2004), abrogated on other grounds by *People v Smith-Anthony*, 494 Mich 669, 682; ___ NW2d ___ (2013). Defendant only challenges the second element.

As noted above, both parties referred to a stipulation that defendant could not possess a firearm because of a prior felony conviction, seemingly satisfying the second element. The prosecutor explicitly did so before the jury, without objection. The trial court explicitly instructed the jury, also without objection, that "the prosecution and defense stipulate, or agree, that defendant was convicted of a specified felony and is ineligible to possess a firearm" and that the jury "may only consider this evidence as proof defendant has a prior conviction." However, we cannot find any actual stipulation in the lower court record. Furthermore, the trial court instructed the jury that defendant's answers to questions about his armed robbery conviction could only be considered for the purpose of assessing his credibility. Consequently, as defendant asserts, there is technically no evidence in the record that could be used to establish the second element of being a felon in possession.

It is unambiguously clear from the record that the stipulation did exist; presumably, it did not make it into the record due to an oversight. However, defendant's counsel never made any objection to any of the mentions of the stipulation. A "defendant must raise objections at a time when the trial court has an opportunity to correct the error and cannot harbor error as an appellate parachute." *People v Buie*, 491 Mich 294, 312; 817 NW2d 33 (2012) (internal citations and quotations omitted). If defendant had timely objected, the trial court could easily have cured the error. "Because error requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence, defendant has waived appellate review of this issue." *People v Gonzalez*, 256 Mich App 212, 224; 663 NW2d 499 (2003) (quotation omitted). In light of the prosecution's decision not to introduce evidence of the conviction despite having a physical copy thereof on hand and defendant's repeated failures to object, the record simply makes no sense unless the parties had genuinely entered into the stipulation. We conclude that reversal is unwarranted.

Defendant also argues that the trial court abused its discretion by permitting the prosecution to impeach him with evidence of his armed robbery conviction. "This Court reviews for an abuse of discretion a trial court's determination whether a prior conviction involving a theft component may be used to impeach a defendant." *People v Meshell*, 265 Mich App 616, 634; 696 NW2d 754 (2005). We find no abuse of discretion.

Admission of evidence for impeachment of a witness with evidence of a prior criminal conviction is governed by MRE 609. In relevant part, the court rule provides:

- (a) For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall not be admitted unless the evidence has been elicited from the witness or established by public record during cross-examination, and

* * *

(2) the crime contained an element of theft, and

(A) the crime was punishable by imprisonment in excess of one year . . . , and

(B) the court determines that the evidence has significant probative value on the issue of credibility and, if the witness is the defendant in a criminal trial, the court further determines that the probative value of the evidence outweighs its prejudicial effect.

It is not contested that defendant's armed robbery conviction contained an element of theft and was punishable by imprisonment in excess of a year. Rather, defendant argues that a sixteen-year-old conviction for armed robbery had little probative value and significant prejudicial effect. The prosecution makes no attempt to rebut this but rather merely points out, correctly although of no relevance to the issue at hand, that the trial court properly cautioned the jury against using the evidence for an improper purpose and that juries are presumed to follow their instructions. See *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

MRE 609 reflects a recognition that there is a great danger of a jury misusing evidence of a prior conviction by drawing conclusions about a defendant's character and therefore about his or her propensity to commit the charged crime, rather than solely about his veracity. *People v Snyder*, 301 Mich App 99, 105; 835 NW2d 608 (2013). However, that presumption is overcome "if the prior conviction 'contained an element of theft' and 'certain conditions are met.'" *Id.*, quoting MRE 609(a)(2). As noted, one of those conditions, that the crime was punishable by imprisonment in excess of a year, is met. The other is that the prior crime has significant probative value to assessing credibility and that any such probative value outweighs any prejudicial effect. *Snyder*, 301 Mich App at 105-107.¹

We recognize that *Snyder* held that theft offenses are not inherently of significant probative value to credibility, and indeed "most theft crimes" are of only minimal or moderate probative value. *Snyder*, 301 Mich App at 109. However, even "minimal" probative value can make a conviction, even an old one, "properly admissible if the probative value outweighs the prejudicial effect." *Meshell*, 265 Mich App at 636. Furthermore, theft crimes cannot possibly be inherently of *no* probative value or the entirety of MRE 609(a)(2) would be nugatory. Indeed, carving out a specific exception for theft offenses to the general prohibition against impeachment by prior conviction would be singularly absurd and pointless were they not deemed to be inherently of at least *some* probative value.

¹ We note that undermining the credibility of a witness is the purpose of seeking admission of evidence under this rule. Therefore, the mere fact that doing so would cause the jury to disbelieve a witness's testimony is to be expected rather than per se proof that admission was inappropriate. Indeed, if any evidence sought to be admitted pursuant to MRE 609 did *not* have some undermining effect on witness credibility, it may well be inadmissible pursuant to MRE 402 unless it was also admissible for some other purpose.

Significantly, the most salient reason for the outcome in *Snyder* was that the trial court had completely abdicated its obligation to articulate why the defendant's prior conviction was of probative value not only once, but a second time after a remand order from this Court explicitly directed it to do so. Consequently, this Court declined to make a finding that the defendant's conviction was probative "absent reasons from the trial court to conclude otherwise." *Snyder*, 301 Mich App at 109. In contrast to the situation in *Snyder*, the trial court here did articulate on the record an analysis of both of these factors. The question is not so much whether the particular prior conviction has significant probative value in the abstract, but rather in the context of the specific case at bar.

In direct and dramatic contrast to the situation in *Snyder*, the trial judge here made it clear on the record that it understood its obligations under MRE 609, and it did in fact make the requisite findings:

The rules do provide that for purposes of attacking credibility of a witness, evidence that the witness has been convicted of a crime shall not be admitted unless the evidence has been elicited, until it's established by public record during cross-examination. That's what's occurring here.

And one of them contains the an [sic] element of propensity for false statement or the crime contains an element of theft. And the crime was punishment [sic] in excess of one year under the law, which he was convicted. And the court determines that the evidence has significant probative value on the issue of credibility. And if the witness is the defendant in a criminal trial, the court further determines that the probative value of evidence outweighs the prejudicial effect.

The court rules pertain to purposes of probative value determination required by this rule. The court shall consider only the age of the conviction and the degree to which a conviction of the crime is indicative of veracity. If a determination of prejudicial effect is requires of the Court to consider only the conviction similarity, the charged events and the possible effects of the decision in the process of admitting the evidence causes the defendant to elect not to testify, the Court must stipulate on the record the analysis of each factor.

In this case we have a crime that is one that contains the element of theft, armed robbery. We have an issue before this court that turns solely upon the credibility of witnesses that are testifying here. This is his claim both not only an alibi witness by his direct testimony that he did not deliver this weapon to Ms. Jackson, it has significant probative value. While it may have some prejudicial effect, that effect cannot measure up to the importance of testing his veracity in determining whether or not he's testifying truthfully or not.

It is in that sense what this defense is about. He chose to testify knowing that this is an offense for which he could be impeached. I believe that it's appropriate to impeach him on it. I will, however, not allow any discussion about whether or not he had a prior armed robbery containing the use of a firearm . . . Prosecutor will not be allowed to inquire as to the specifics of that offense and the background of that crime.

Again, unlike the trial judge in *Snyder*, the court here did “articulate, on the record, the analysis of each factor.” MRE 609(b). We do not find the trial court’s reasoning outside the range of principled outcomes.

The evidence of defendant’s armed robbery conviction was relevant and probative because it assisted the jury with its calculations of witness credibility in a trial with several witnesses. With his own testimony and that of two others, defendant presented an alibi defense that suggested that he could not have been where the prosecution’s witnesses said he was at the time of the offense. It was appropriate for the prosecution to attempt to attack defendant’s credibility in order to propose that defendant’s alibi carry less weight during the jury’s deliberations. The trial court certainly satisfied its obligation of making and articulating an actual finding. We agree with the prosecution that this was a close question, and consequently, the trial court’s brevity is more than outweighed by the deference to which its exercise of discretion is entitled. See *People v Sabin*, 463 Mich 63, 67; 614 NW2d 888 (2000).

The trial court also properly found that the prejudicial effect did not outweigh the probative value of the evidence. Defendant presented additional alibi witnesses in addition to himself; consequently, his version of events was significantly bolstered and the undermining effects of his own impeachment weakened. Furthermore, had defendant elected not to testify, he would not have been unable to present a meaningful alibi defense. Defendant’s testimony was simply not of critical importance to the decisional process. See *People v Allen*, 429 Mich 558, 606, 611; 420 NW2d 499 (1988). The trial court commendably restricted the inquiry into the fact of defendant’s prior conviction alone, and specifically forbade any questions regarding with what defendant had been armed. As the trial court observed, there is no reason to believe that defendant was more likely armed with a firearm than with a knife, a baseball bat, or anything else. Finally, the trial court clearly instructed the jury immediately after defendant’s cross-examination that the jury was only permitted to use the evidence to “assess whether this individual is testifying truthfully,” not to determine whether he was more likely to commit any of the charged offenses. We do not find the trial court’s decision to admit the evidence of defendant’s prior conviction for impeachment purposes to be an abuse of discretion.²

Defendant also argues that he received ineffective assistance of counsel. Specifically, he asserts that trial counsel should have moved for a directed verdict on the basis of insufficient evidence and should not have permitted defendant to testify after the trial court rendered its decision to permit the impeachment evidence pursuant to MRE 609. “To establish ineffective assistance of counsel, defendant must first show that (1) his trial counsel’s performance fell below an objective standard of reasonableness under the prevailing professional norms, and (2) there is a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different.” *People v Uphaus*, 278 Mich App 174, 185; 748 NW2d 899 (2008). We find neither condition satisfied.

² We also note that, as previously discussed, the jury was already aware, with or without this impeachment evidence, that defendant was a convicted felon.

Defendant's argument that trial counsel should have moved for a mistrial on the basis of insufficient evidence is based on the failure to place the discussed stipulation on the record. Initially, it is not clear who, if anyone, should shoulder the blame for the obvious oversight. More importantly, it obviously *was* an oversight. Had trial counsel become aware that there was technically no evidence formally admitted into evidence of defendant's prior conviction, the record unambiguously indicates that the error would have been corrected immediately by reading the stipulation to the jury. We find that counsel did not fall below an objective standard of reasonableness and that there is absolutely no possibility that the result of the proceedings would have differed.

Defendant's argument that trial counsel should not have permitted him to testify also fails. The decision whether to have a defendant testify on his own behalf is a matter of trial strategy. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Counsel is strongly presumed to have made reasonable tactical decisions and has considerable discretion in doing so. *People v Vaughn*, 491 Mich 642, 670; 821 NW2d 288 (2012); *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Furthermore, particularly in light of his other alibi witnesses and the numerous prosecution witnesses against him, it is pure speculation to draw a conclusion whether his testimony had any effect at all on the outcome of the proceedings, with or without impeachment. We cannot conclude that trial counsel rendered ineffective assistance by concluding that defendant was better off presenting his version of events to the jury despite the impeachment.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Amy Ronayne Krause